State Liability and Infringements Attributable to National Courts; a Dutch perspective on the Köbler Case

Jans, J.H.

Published in:
Liber Amicorum Alfred E. Kellermann – The EU: An Ongoing Process of Integration

STATE LIABILITY AND INFRINGEMENTS ATTRIBUTABLE TO NATIONAL COURTS: A DUTCH PERSPECTIVE ON THE *KÖBLER* CASE

J.H. Jans*

1. THE FACTS IN *KÖBLER* [1]

Gerhard Köbler had been employed as an ordinary university professor in Innsbruck (Austria) since 1 March 1986. On his appointment, he was awarded the salary of an ordinary university professor – grade 10 – increased by the normal length-of-service increment. Ten years later, he applied for the special length-of-service increment for university professors under Article 50a of the *Gehaltsgesetz* (Salaries Act) of 1956. He claimed that, although he had not completed fifteen years' service as a professor at an Austrian university, he had completed the requisite length of service if the duration of his service at universities in other Member States of the European Community was taken into account. He claimed that the condition of the completion of fifteen years' service solely in Austrian universities, with no account being taken of periods of service in universities in other Member States, constituted unjustified indirect discrimination under Community law. Köbler then instituted proceedings before the *Verwaltungsgerichtshof* (administrative court), which referred the matter to the Court of Justice for a preliminary ruling. In the meantime, the Court of Justice had delivered its judgment in *Schöning-Kougebetopoulou*.[2] The Court of Justice asked the *Verwaltungsgerichtshof* whether – in the light of this judgment – it deemed it necessary to maintain its request for a preliminary ruling. On 24 June 1998, the *Verwaltungsgerichtshof* withdrew its request for a preliminary ruling and dismissed Köbler's application, on the grounds that the special length-of-service increment was a loyalty bonus that objectively justified a derogation from the Community law provisions on freedom of movement for workers. Köbler refused to give up and brought an action for damages against the Republic of Austria. In

* Prof. Jans (1956) teaches EU law at the University of Amsterdam and public law at the University of Groningen.

[1] Case C-224/01 *Köbler*, judgment of 30 September 2003.

[2] Case C-15/96 *Schöning-Kougebetopoulou* [1998] *ECR* I-47.

The European Union: An Ongoing Process of Integration – Liber Amicorum Alfred E. Kellermann

his view, the judgment of the *Verwaltungsgerichtshof* infringed directly applicable provisions of Community law.

2. THE PRINCIPLE OF STATE LIABILITY FOR JUDICIAL ACTS

The first question the Court had to answer was one of principle. Can the State be held liable for judicial mistakes? The Court observed that it had already held in *Brasserie du Pêcheur and Factortame*[3] that the principle of State liability holds good in any case in which a Member State breaches Community law, whatever the organ of the State whose act or omission was responsible for the breach. It then pointed out the essential role played by the judiciary in protecting the rights individuals derive from Community rules, and that the full effectiveness of those rules would be called into question if individuals were precluded from being able to obtain reparation in the event of errors by the judiciary. The Court particularly stressed the crucial role played by a court adjudicating at last instance, as this is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of these rights by the final decision of such a court cannot normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order to obtain legal protection of their rights. The Court concluded:

> 'Consequently, it follows from the requirements inherent in the protection of the rights of individuals relying on Community law that they must have the possibility of obtaining redress in the national courts for the damage caused by the infringement of those rights owing to a decision of a court adjudicating at last instance (see in that connection *Brasserie du Pêcheur and Factortame*, cited above, paragraph 35).' (para. 36)

It is striking that the Court went on to consider the main objections Member States had raised against the principle of State liability in respect of these kinds of judicial decisions only after it had stated its position on this matter of principle. In the first place, the arguments put forward were based on the principle of legal certainty and, more specifically, the principle of *res judicata*. While acknowledging the importance of the principle of *res judicata*,[4] the Court dismissed this argument:

---

[3] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] *ECR* I-1029, para. 32.

[4] See also the judgment in Case C-453/00 *Kühne & Heitz*, 13 January 2004, para. 24.

> '[I]t should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.' (para. 39)

Nor did arguments based on the independence and authority of the judiciary fare any better. As regards the independence of the judiciary, the Court observed that the principle of liability in question concerned not the personal liability of the judge but that of the State:

> 'The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.' (para. 42)

And it was clearly little impressed by the argument based on the risk of a diminution of judicial authority: '[T]he existence of a right of action that affords, under certain conditions, reparation of the injurious effects of an erroneous judicial decision could also be regarded as enhancing the quality of a legal system and thus in the long run the authority of the judiciary.' (para. 43)

Finally, the Court considered the argument that it was difficult in many legal systems to designate a court competent to determine such disputes. It observed that application of the principle of State liability could not be compromised by the absence of a competent court. Referring to its well-known judgments in *Rewe* and *Comet*, the Court observed in paragraph 46 that: 'it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law.' It went on to state:

> 'Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system.' (para. 47)

The Court concluded, in summary,

> 'that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.' (para. 50)

3. THE CONDITIONS GOVERNING STATE LIABILITY

The Court then discussed the conditions governing State liability. In paragraph 51, it stated the familiar three conditions: 'the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.' In paragraph 52, it went on to add: 'State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.' However, as regards the requirement of 'a sufficiently serious breach', it noted that regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty: 'State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has *manifestly* infringed the applicable law.' (para. 53, emphasis added)

In order to determine whether this condition was satisfied, namely, whether the infringement was manifest, the national court must take account of various factors, including:

> 'the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC.' (para. 55)

In any event, the protection thus afforded is a minimum protection and this therefore 'does not mean that the State cannot incur liability under less strict conditions on the basis of national law.' (para. 57)

Such claims are governed by the 'ordinary' rules of national law on liability,

'with the proviso that the conditions for reparation of loss and damage laid down by the national legislation must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation.' (para. 58)

In paragraph 59, the Court summarised the above one more time:

'In the light of all the foregoing, the reply to the first and second questions must be that the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.'

4. HOW DID IT END?

Although it is normally for the national courts to apply the conditions for liability (see *Brasserie du Pêcheur and Factortame*, paras. 55-57), in this case the Court felt able to do so itself, as it had all the relevant information at its disposal. As regards the requirement that the rule of law infringed must confer rights on individuals, the Court held that it could not be disputed that Article 39 EC and Article 7(1) of Regulation No 1612/68 were intended to confer such rights. By doing so, the Court also indicated that the primary basis for State liability in respect of judicial errors must be sought in the underlying substantive law rather than in the infringement of the third paragraph of Article 234 EC. This important point will be considered in more detail below.

As regards the requirement that the breach be sufficiently serious, the Court first described the precise course of the proceedings and then, in paragraphs 117 and 118, arrived at the conclusion that – in the light of *CILFIT*[5] – the *Verwaltungsgerichtshof* should have maintained its request for a preliminary ruling. Accordingly, the *Verwaltungsgerichtshof* infringed Community law when it gave

[5] Case 283/81 *CILFIT* v. *Ministry of Health* [1982] *ECR* 3415.

its judgment (para. 119). The next step was to examine whether this infringement constituted 'a manifest infringement' of Community law, having regard to the factors indicated in paragraphs 55 and 56. In this case, the Court held that there was no question of a manifest infringement. In the first place, the infringement of substantive law – Article 39 EC and Article 7(1) of Regulation No 1612/68 – could not in itself be so characterised:

> 'Community law does not expressly cover the point whether a measure for rewarding an employee's loyalty to his employer, such as a loyalty bonus, which entails an obstacle to freedom of movement for workers, can be justified and thus be in conformity with Community law. No reply was to be found to that question in the Court's case-law. Nor, moreover, was that reply obvious.' (para. 122)

Nor, in the second place, could the infringement of Article 234 EC – the failure to maintain the request for a preliminary ruling – be regarded as 'a sufficiently serious breach':

> 'the *Verwaltungsgerichtshof* had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of Community law to be resolved had already been given in the judgment in *Schöning-Kougebetopoulou*, cited above. Thus, it was owing to its incorrect reading of that judgment that the *Verwaltungsgerichtshof* no longer considered it necessary to refer that question of interpretation to the Court.' (para. 123)

In short, the *Verwaltungsgerichtshof* may have infringed Community law when it gave its decision of 24 June 1998, but 'in the light of the circumstances of the case', there was no reason for the Court to regard this infringement as being manifest in nature and thus as sufficiently serious.

5. SOME COMMENTS

5.1 **The principle of State liability**

The matter has finally been resolved. *Francovich*[6] liability does indeed apply to all organs of the State, including a court adjudicating at last instance. In some respects, this decision is not surprising. After *Brasserie du Pêcheur* it was hardly conceivable that the Court would decide that judicial errors could not give rise to liability. In this sense, *Köbler* is fully in line with the Court's judgment in

[6] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] *ECR* I-5357.

Commission v. *Italy*,[7] where Italy was held to have failed to fulfil its obligations under the Treaty because the manner in which Italian courts, 'including the *Corte suprema di cassazione*', applied Italian legislation was incompatible with Community law.

5.2 The conditions

Nor can the conditions for State liability really be considered surprising. The central criterion remains that the breach must be 'sufficiently serious'. The Court does, however, sow some confusion by concluding, after it has pointed out the specific nature of the judicial function, that the State can incur liability only where the national court has 'manifestly' infringed the applicable law. Although the 'judicial function' is not so special that judicial errors should as such be excluded from State liability, regard must be had to the specific nature of this function when determining the conditions. The question is whether the Court here means anything different from what it means when it employs the usual formula for determining whether a breach is sufficiently serious. According to this formula, in the first place, a breach is sufficiently serious where 'a Member State, in the exercise of its legislative powers, has manifestly and gravely disregarded the limits on its powers…', and, secondly, 'where, at the time when it committed the infringement, the Member State in question had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach'.[8] The application of the requirement that the breach be 'manifest', particularly in connection with Article 234 EC, is examined in more detail below.

5.3 Primary basis?

In our book on the 'Europeanisation' of Dutch administrative law,[9] we assert that the European dimension of the issue of State liability for wrongful judicial decisions is in fact confined to possible liability for judicial bodies that fail to fulfil their obligations under the third paragraph of Article 234. This view will have to be revised in the next edition. It is clear from the Court's decision in *Köbler* that the *primary* basis for liability is the infringement of the underlying substantive rules. This is because, if the key issue was the infringement of the third paragraph of Article 234 EC, it would have been logical for the Court to concentrate on how the

---

[7] Case C-129/00 *Commission* v. *Italy*, judgment of 9 December 2003.

[8] See, for instance, Case C-118/00 *Larsy* [2001] *ECR* I-5063, para. 38.

[9] J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Inleiding tot het Europees bestuursrecht*, 2nd edn. (Nijmegen, Ars Aequi 2002) p. 402. The authors intend to publish an English version of this book in 2005/2006.

obligation to refer questions to the Court of Justice protects the rights of injured parties when considering whether the rules that had been infringed 'confer rights on individuals'. Instead, in paragraph 103 et seq., the Court discusses whether the provisions of Article 39 EC and Article 7(1) of Regulation 1612/68 confer rights on individuals. Moreover, in paragraph 117, the Court observes that the *Verwaltungsgerichtshof* ought to have maintained its request for a preliminary ruling. In other words, it infringed the third paragraph of Article 234 by withdrawing its request. To use the terminology of *CILFIT*, the condition that there can be 'no scope for any reasonable doubt as to the manner in which the question raised is to be resolved' was not fulfilled. The infringement of the third paragraph of Article 234 in combination with a wrong application of the underlying substantive law (as was indeed the case in *Köbler*) does not in itself give rise to liability. This is insufficient for the Court to regard it as a 'manifest infringement'. In other words, failure to meet the 'absence of reasonable doubt' criterion in *CILFIT* is insufficient to make the infringement 'manifest'. This seems to imply a double reasonableness test, and this would seem to imply that the Court of Justice allows courts more latitude to make errors than other organs of the State. This is only otherwise in cases where a national court more or less categorically refuses to apply the existing case law of the Court of Justice. In this kind of case, 'strict' liability under *Francovich* applies. As far as case law is concerned, this is unlikely to be the most important category of cases. There are, fortunately, few examples of decisions by the highest national courts where Community law has been ignored.[10]

Wattel has pointed out that the combination of *Köbler* and *CILFIT* could lead to many more references for a preliminary ruling.[11] It is therefore worth quoting again the words the Court used in *CILFIT* to indicate when the highest national court is relieved of its obligation to refer a matter to the Court of Justice on grounds that the matter is obvious:

> 'Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.' (*CILFIT*, para.16)

---

[10] But see the case of *Dangeville*, European Court of Human Rights, 16 April 2002, and Case C-129/00 *Commission* v. *Italy*.

[11] P.J. Wattel, 'Staatsaansprakelijkheid voor EG-rechtelijk onrechtmatige hoogste rechtspraak', 134 *WPNR* (2003) pp. 840-845.

If this means what it says, this exception does not amount to much. The conditions are so strict that the national court will not readily conclude that it is not required to refer the matter to the Court of Justice. It is therefore quite possible that *Köbler* will lead to considerably more requests for a preliminary ruling 'just to be on the safe side'. This in turn will undoubtedly result in the Court making more active and more frequent use of Article 104(3) of its Rules of Procedure:

> 'Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case-law or where the answer to the question admits of no reasonable doubt, the Court may, after informing the court or tribunal which referred the question to it, hearing any observations submitted by the persons referred to in Article 23 of the Statute and hearing the Advocate General, give its decision by reasoned order in which, if appropriate, reference is made to its previous judgment or to the relevant case-law.'

If the Court were to make more use of this article, this could well adversely affect the already sensitive relationship between the Court of Justice and the highest national courts. It is no secret that national courts are 'not amused' when the Court gives its decision by reasoned order under Article 104(3) of its Rules of Procedure. This is because application of Article 104(3) implies that the court referring the matter is unfamiliar with the case law of the Court of Justice. And courts, especially the highest courts, do not like to be told this. It seems to me that it is high time a national court requested a preliminary ruling on the exact scope of paragraph 3 of Article 234 EC and the *CILFIT* doctrine. In particular, the question should be whether *CILFIT*, in its literal sense, still applies, or whether the criteria need to be revised. As far as the Netherlands is concerned, either the *Afdeling bestuursrecht* (Administrative Law Division of the Netherlands Council of State) or the *belastingkamer van de Hoge Raad* (Tax Division of the Netherlands Supreme Court) – both of which have in the past been confronted with Article 104(3) decisions – might find a cause to refer this matter to the Court of Justice.[12]

In principle, only judgments of courts of last resort can give rise to State liability. And, as is clear from the Court's decision in *Lyckeskog*,[13] in some cases an inferior court may also be a court of last resort. In other words, the court must be one which is obliged to request a preliminary ruling under Article 234 EC. This does indeed seem to me to be the correct principle. A person wishing to appeal against a decision of an inferior court that has applied Community law

---

[12] Joined Cases C-307/00 to C-311/00 *Oliehandel Koeweit and Others* [2003] *ECR* I-1821; Case C-102/00 *Welthgrove* [2001] *ECR* I-5679.

[13] Case C-99/00 *Lyckeskog* [2002] *ECR* I-04839.

'wrongly' must appeal to a higher court, in the same way as where an inferior court has applied national law wrongly. The 'normal' appeal procedure must first be followed, right up to the highest national court, failing which a judicial decision becomes *res judicata* and an administrative decision becomes final.[14]

Nor can I subscribe to the wish to allow liability for the conduct of inferior courts, at least not where it is framed in such general terms. The restriction to courts of last resort implies an 'exhaustion of local remedies rule' before the State can be held liable. The only exceptions I would consider acceptable would be in the cases suggested by Advocate-General Geelhoed.[15] Particularly where inferior courts consistently interpret and apply certain parts of Community law incorrectly, this can discourage litigants from initiating proceedings or going on to appeal. This might justify an exception to the rule, allowing the State to be held liable for the conduct of inferior courts.

5.4 Procedural consequences in Dutch law

It is impossible to tell what the procedural consequences of this decision will be. The Court of Justice disposes of the matter a little too simply in paragraph 58 by referring the matter to rules of national law. Under Dutch law, a *Köbler* action would have to be instituted in a civil action against the State. In other words, in the Dutch legal order, the *Hoge Raad*, the highest ordinary court, would ultimately have to decide on judicial errors of the highest administrative courts: the *Afdeling bestuursrecht*, the *College van Beroep van het Bedrijfsleven* (Trade and Industry Appeals Tribunal) and the *Centrale Raad van Beroep* (Central Appeals Tribunal for the public service and social security matters). However you look at it, this would give the *Hoge Raad* the final word on whether administrative courts have fulfilled their Community law obligations properly. This would mean that *Köbler* had acquired unexpected constitutional implications.

Incidentally, *Köbler* may touch on far greater constitutional sensitivities in other Member States. For example, what if claims for State liability were brought before 'ordinary' courts for errors of constitutional courts such as the *Bundesverfassungsgericht*, the *Corte constitutionale*, the *Arbitragehof*, and so forth?

As regards administrative law mistakes, Steyger[16] and Verhey,[17] among others, note that, in addition to bringing a civil action against the State for a wrongful

---

[14] See further J.H. Jans and K.J. de Graaf, 'Rechtsbescherming - Bevoegdheid = verplichting? Enkele opmerkingen over de uitspraak van het Hof van Justitie in de zaak *Kühne & Heitz*', 10 *NTER* (2004) pp. 98-102.

[15] See his Opinion in Case C-129/00 *Commission* v. *Italy*, para. 63.

[16] E. Steyger, 'Rechtsbescherming – De gevolgen van de aansprakelijkheid van de Staat voor rechterlijke schendingen van EG-recht', 10 *NTER* (2004) pp. 18-22.

[17] In his annotation to Case C-453/00 *Kühne & Heitz* in *JB* 2004/42.

judicial decision or against the public law body responsible for infringing the underlying substantive Community law rule, the injured party can also attempt to obtain an independent decision on reparation from the administrative body concerned. If that body refuses to issue such a decision, he can then take the administrative law route to obtain redress. It can indeed be assumed, on the basis of well-known Dutch case law,[18] that a written decision of an administrative organ on a request for reparation of loss caused within the context of the exercise by that organ of a power based on public law – even if that request does not have a specific statutory basis – is a public law legal act and thus a *besluit* (appealable decision) within the meaning of Section 1:3 of the *Algemene wet bestuursrecht* (General Administrative Law Act). In the light of the decision of the *Hoge Raad* in *Groningen/Raatgever*,[19] it must for the time being be assumed that an injured party can choose which route he takes to obtain reparation.

5.5 ***Köbler* combined with *Kühne & Heitz***

Matters become even more complicated if we combine *Köbler* with the Court's judgment in *Kühne & Heitz*. Another avenue open to an injured party is to request the administrative body to 'reconsider' the decision that caused the loss or damage; and under certain circumstances – according to the judgment in *Kühne & Heitz* – it is obliged to reconsider a decision that conflicts with Community law. That being the case, the question arises how this fits in with the obligation under *Brasserie du Pêcheur* to limit the extent of loss or damage? In *Brasserie du Pêcheur*, the Court observed that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself. Does this mean that injured parties must now first request the administrative body in question to reconsider its earlier decision before bringing an action against the State for judicial errors? And if this request is rejected, must they then first go through the entire administrative law process before the State can be held liable? In my article on the judgment in *Kühne & Heitz* in *NTER*,[20] I argued that this last question should be answered in the negative, because otherwise matters would drag on forever. It seems to me that requiring this of an injured party goes beyond the bounds of 'reasonable diligence'.

The question that remains unanswered is how we should deal, in procedural terms, with errors of the *Hoge Raad*. It is a moot point whether Articles 6 and 13 ECHR would preclude it from hearing a case in which its own mistake was the subject of the dispute. And Steyger rightly notes in her article in *NTER* that it is

---

[18] *Van Vlodrop, AB* 1997, 229, with note by PvB.
[19] HR 17 December 1999, *AB* 2000, 89, with note by PvB.
[20] See n. 14 *supra*.

not likely that such a procedure – within the same branch of the judiciary – would result in a favourable decision for the injured party.[21]

6. CONCLUSIONS

The above remarks clarify why I do not feel entirely comfortable with the Court's judgment. Apart from raising many new points of law, it disturbs me because:

- there is no empirical evidence that there really is a problem in the way the highest national courts apply Community law;
- the judgment may well increase the number of unnecessary referrals and thus prolong preliminary ruling proceedings even more;
- this will increase the pressure on the Court of Justice to apply Article 104(3) of its Rules of Procedure, and this in turn is unlikely to improve the relationship with national courts; and
- it may well be necessary to make changes in the national law to channel the consequences of the judgment. Failing this, a hierarchy will be created in the application of Community law where none now exists, and decisions of the specialised administrative courts will become subject to review by the *Hoge Raad*.

It is also debatable whether *Köbler* is consistent with the proportionality principle. Even assuming there is a problem concerning the application of European law by the highest national courts, the solution that has been chosen seems to go further than strictly necessary. It should be remembered that even the *Köbler* doctrine will not be sufficient to prevent national courts from making 'mistakes' when applying Community law. After all, it is the selfsame national court that retains the final word. We all know about Alfred Kellermann's tireless endeavours regarding the training of national judges in European law, but he also understood that European law is firmly rooted in national law. So perhaps there is something to be said for the Dutch system after all, in which liability for judicial acts is only recognised where they infringe fundamental principles of law.[22]

---

[21] See n. 16 *supra*.
[22] HR 29 April 1994, *NJ* 1995, 727, with note by EAA.